

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

House Bill 961 (Delegate Pena-Melnyk, *et al.*)
Health and Government Operations

Maryland Medical Assistance Program - Subrogation - Reduction

This bill reduces the amount of money permitted to be recovered by the Department of Health and Mental Hygiene (DHMH) under a Medicaid subrogation claim by up to one-third unless DHMH files a petition to intervene in a cause of action and is independently represented by counsel. The bill also authorizes DHMH to voluntarily reduce a subrogation claim relating to a Medicaid recipient if DHMH finds that collection of the claim will cause substantial harm to a trust created for the benefit of the recipient.

Fiscal Summary

State Effect: Medicaid special fund revenues and expenditures decline and general fund expenditures increase by a significant amount beginning in FY 2013 due to a reduction in the amount permitted to be recovered under Medicaid subrogation claims. The exact amount of the special fund revenue loss cannot be reliably estimated at this time and will depend on the number of causes of action, actual attorney's fees, and the amount of individual subrogation claims. The Governor's proposed FY 2013 budget includes a \$3.0 million cost containment item, a portion of which is attributable to anticipated savings from third-party liability collections based on current DHMH subrogation policy. The bill limits DHMH's ability to achieve a portion of these savings.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The amount permitted to be recovered by DHMH must be reduced by dividing the amount of the total recovery into the total amount of the attorney's fees incurred by the Medicaid recipient and multiplying the result by the amount of DHMH's subrogation claim.

For example, if a recipient is awarded a total recovery of \$500,000 and incurred attorney's fees of \$150,000, DHMH's subrogation amount would be reduced by 30% ($\$150,000 \div \$500,000$, or 0.3). If in such a case, the total attorney's fees had been \$200,000, DHMH's subrogation amount would be reduced by a maximum of 33%, even though the proportion of attorney's fees was greater ($\$200,000 \div \$500,000$, or 0.4).

The bill also repeals language under which DHMH is not liable for payment of or contribution to any attorney fees or litigation costs of any Medicaid recipient or attorney, guardian, or personal representative of a recipient. Language stating that the deduction of applicable attorney fees and litigation costs may not be considered as payment for or contribution to those fees or costs by DHMH is likewise repealed.

Current Law: If a Medicaid recipient has a cause of action against a person, DHMH must be subrogated to that cause of action to the extent of any payments made by DHMH on behalf of the recipient that result from the occurrence that gave rise to the cause of action. Any Medicaid recipient or attorney, guardian, or personal representative of a recipient who receives money in settlement of or under a judgment or award in a cause of action in which DHMH has a subrogation claim must hold the amount of money required for the subrogation claim for DHMH after deducting applicable attorney fees and litigation costs.

DHMH is not liable for payment of or contribution to any attorney fees or litigation costs of any Medicaid recipient or attorney, guardian, or personal representative of a recipient. The deduction of applicable attorney fees and litigation costs may not be considered as payment for or contribution to those fees or costs by DHMH. DHMH may compromise or settle and release its subrogation claim if collection of the claim will cause substantial hardship to the recipient or the surviving dependents of a recipient (in a wrongful death action).

Under § 11-112 of the Courts and Judicial Proceedings Article, the amount permitted to be recovered by a payor (*i.e.*, a health insurance carrier) for health care benefits or services for an injured person paid or payable by a payor must be reduced by dividing the amount of the total recovery into the total amount of the attorney's fees incurred by the injured person and multiplying the result by the amount of the payor's subrogation claim unless the payor files a petition to intervene in the personal injury action and is

independently represented by counsel. The payor's subrogation claim cannot be reduced by more than one-third.

Background: Although not specified in statute or regulations, current Medicaid policy limits recovery in subrogation claims to the lesser of full recovery of Medicaid costs or 50% of the net settlement (the total settlement amount less attorney's fees and costs). According to DHMH, this policy is intended to ensure that the Medicaid enrollee always receives a share of the settlement proceeds regardless of the amount of the settlement or Medicaid costs. This provides an economic incentive to an enrollee to pursue third-party litigation, without which Medicaid may never reclaim third-party liabilities.

In September 2011, DHMH published proposed third-party liability regulations (COMAR 10.09.81.01, *et seq.*) in the *Maryland Register* intended to codify the existing subrogation policy. These regulations would have allowed attorneys to receive fees and litigation costs prior to the application of any formula that would have been applied to calculate the State's recovery from the judgment, award, or settlement. DHMH would then recover the lesser of the full amount of past medical costs paid by DHMH or 50% of the judgment, award, or settlement. The proposed regulations were withdrawn in December 2011.

This bill would reduce the amount that Medicaid is eligible to collect under a Medicaid subrogation claim in the same manner as current law reduces the amount payable in a subrogation claim to a payor for health care benefits or services paid on behalf of an injured person.

According to DHMH, in fiscal 2011, Medicaid recovered \$6.4 million in special fund revenues under the current subrogation policy. At the end of fiscal 2011, 1,400 third-party liability cases were pending, representing a total of more than \$90 million in Medicaid expenditures. Of these cases, 11 involved amounts of over \$1.0 million in Medicaid expenditures.

State Fiscal Effect: According to DHMH, compared with *current policy*, this bill reduces the amount of special funds that the department is able to recover under its right of subrogation by up to one-third. Based on fiscal 2011 recoveries, the special fund revenue loss would have been at least \$2.1 million. Any reduction in special fund revenues (and expenditures) requires a corresponding increase in general fund Medicaid expenditures. DHMH further indicates that the department does not have the staff or budget to provide Medicaid with independent representation in each of the 1,400 pending third-party liability cases.

The Governor's proposed fiscal 2013 budget includes a \$3.0 million cost containment item, a portion of which is attributable to anticipated savings from third-party liability

collections based on current DHMH subrogation policy. If this bill passes, or if regulations codifying current DHMH subrogation policy are not adopted, DHMH will not be able to achieve a portion of these savings.

Additional Information

Prior Introductions: None.

Cross File: SB 575 (Senator Astle) - Finance.

Information Source(s): Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Department of Legislative Services

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Analysis by: Jennifer B. Chasse

Direct Inquiries to:
(410) 946-5510
(301) 970-5510